Is the use of clandestine video cameras by the company to monitor its workers valid?

It can be argued that to video-surveillance workers, it is necessary to inform them in advance that they are being recorded so as not to violate expectations of confidentiality (Supreme Court Ruling, January 15, 2019). Although, contrary to this thesis, we can find other statements that consider that it is not necessary to notify the existence of these visual means if they are only used exclusively to control jobs, since the worker must comply with the specific obligations of his job. of work in accordance with the rules of good faith and diligence, which logically excludes the performance during working hours of activities unrelated to the job. This conflict seemed to have been resolved by the jurisprudence of the Constitutional Court, in the sense that it is not necessary for the worker or his representatives to know the exact location of the audiovisual media, as long as they are limited to exclusively recording the jobs. But it is necessary that workers and their representatives know of the existence of these means. This line of jurisprudence is also respectful of ordinary legality, which, as we have seen, in accordance with art. 64.5 of the Workers' Statute (ET), establishes that the company must obtain a prior, although non-binding, report from the legal representation of the workers, among other matters, before the implementation and review of work organization and control systems.

However, in its latest rulings, the High Court has accepted the use of clandestine video surveillance means, arguing that this power of control is legitimized by art. 20.3 of the ET, which expressly authorizes the employer to adopt surveillance and control measures to verify compliance by workers with their labor obligations. This general power of control provided for in the law legitimizes business control of workers' compliance with their professional tasks and the workers' consent for such purposes is implicit in the conclusion of the employment contract. Furthermore, it is sufficient for the existence of several signs displayed by the company in the facilities to announce the presence of camera installation and image capture. Thus, for example, STC 119/2022, in a case of worker theft, where security cameras are used that are advertised with a video surveillance sticker. In my opinion, this reasoning clearly contravenes the expectations of rights or confidentiality that may arise for the worker if he has not been previously informed about such recordings, also taking into account that he could be sanctioned based on what is said on those recordings.

That is why the company must have established with absolute clarity and in advance the rules for using the aforementioned control mechanism. In our opinion, the TC confuses surveillance cameras to protect the company's assets, for which the mere existence of badges announcing their presence would be sufficient, as indicated in art. 89.1 of Organic Law 3/2018, of December 5, on the Protection of Personal Data and Guarantee of Digital Rights, with video surveillance whose objective is to control compliance or not with the labor obligations of workers, such as control and access to jobs, among others. In cases like the present one, in my opinion, when the employer intends to use the recordings captured by the security cameras for labour control purposes, he must previously inform the workers of said situation, that is, “in “In what cases the recordings can be examined, for how long and for what purposes.” In particular, the employer must expressly, clearly and unequivocally inform about the possibility that the recordings made may “be used for

the imposition of disciplinary sanctions for breaches of the employment contract. Otherwise, the sanctions, which may include a possible dismissal, will be null. On the contrary, it can be maintained, as the High Court affirms, that the mere knowledge of the workers of the existence of such means is sufficient, assuming that the workers must know that such means are intended for the control of the compliance with labour obligations and that, therefore, non-compliance found through them can be sanctioned.

However, in my opinion, the worker may think that the means have other purposes, such as protecting the company's assets from theft or theft and not to control compliance with work obligations such as, for example, the schedule or that they have a purely dissuasive purpose. Therefore, it is essential that, in addition to their existence, the worker is informed that the recordings may also be used to impose sanctions. Otherwise, the worker could claim a different expectation of confidentiality, especially when he or she has been informed by the company itself that it is not a labour surveillance system, but that the installation of these control systems has been incorporated for very different purposes. , as an example, to prevent theft.

Clandestine surveillance measures Thus, we understand that clandestine surveillance measures, taken “ad hoc” against a worker, in a discriminatory manner, do not overcome the proportionality judgment necessary to limit their fundamental right to privacy. It would be the same as saying that the conclusion of an employment contract would, in itself, empty the content of the exercise of fundamental rights, since the company can condition them not only without the consent of the worker, but not even with prior information. necessary to the worker and, therefore, without having clearly established the rules of the game. If the worker is not free to dispose of, through the employment contract, the rights recognized by the Laws and collective agreements, in accordance with art. 3.5 of the ET, a fortiori, they cannot have access to, through the employment contract, the fundamental rights that are inherent to them due to their condition as a person, as a citizen. Now, the High Court does not seem to assess whether this case is harmful to the right to privacy, enshrined in art. 18.1 of the EC, but seems to place the conflict in the scope of the right to the protection of personal data, guaranteed in art. 18.4 of the constitutional text. Thus, as part of the scientific doctrine highlights, the High Court seems to raise the legitimacy of the company's powers of surveillance over workers, from the perspective of the right to protection of personal data, as a self-sufficient and autonomous right. of the right to privacy, in such a way that the proportionality judgment would no longer be sufficient to delimit the company's surveillance powers and now the key element would become the right to the protection of personal data.

In any case, even raising the conflict in these terms, first of all, art. 89.1 of Organic Law 3/2018, of December 5, on the Protection of Personal Data and Guarantee of Digital Rights, requires workers to be informed in advance, and in an express, clear and concise manner. Only in the case of flagrant commission of an illegal act by workers will the duty to inform be deemed fulfilled when at least the corresponding device or stickers exist. However, at this point, we must highlight the recent Judgment of the European Court of Human Rights, Grand Chamber, of October 17, 2019, which requires serious irregularities for these cases. In my opinion, serious irregularities must be understood as crimes. In such a way that the requirement established by art increases. 89.1 of the LOPD, which only requires illegal acts. Illegal acts can be less serious irregularities, contractual

breaches. But, in my opinion, the Grand Chamber now raises the requirement for these cases to the commission of crimes.

Therefore, in my opinion, the conflict should be raised again in its true terms, as a violation of the right to personal privacy, which must be guaranteed through the judgment of proportionality, which weighs all these circumstances, to determine whether the limitation of the worker's Fundamental Right is justified. In these fair terms, I understand that clandestine and discriminatory measures or, if you prefer, “ad hoc” surveillance measures against a single worker do not overcome the judgment of proportionality, making it necessary, therefore, to establish generic surveillance measures for all workers, always. that there is prior communication of its existence to workers, so that expectations of confidentiality are not violated.